Bodibasixs Manufacturing Sdn Bhd v Entogenex Industries Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-426–12 OF 2016
AZIZUL AZMI ADNAN J
3 MAY 2018

Contract — Goods sold and delivered — Claim for payment — Plaintiff manufactured mosquito repellent product for defendant — Product delivered to defendant — Defendant failed to make payment — Plaintiff sued defendant for goods sold and delivered — Defendants counterclaimed for negligence — Whether goods delivered — Whether defendant failed to make payment

Tort — Negligence — Manufacture of goods — Plaintiff manufactured mosquito repellent product for defendant — Product delivered to defendant — Defendant failed to make payment — Plaintiff sued defendant for goods sold and delivered — Defendants counterclaimed for negligent — Whether losses sustained by defendant reasonably foreseeable — Whether there existed relationship of proximity between parties — Whether it would be just, fair or reasonable for court to impose duty of care on plaintiff — Whether plaintiff owed duty of care to defendant — Whether there was breach of duty of care

The defendant engaged the plaintiff to manufacture mosquito repellent known as Denguard lotion. The plaintiff had manufactured the goods and delivered the same to the defendant, but the defendant failed to pay the price of the goods to the plaintiff. Consequently, the plaintiff sued the defendant for goods sold and delivered. The defendant counterclaimed that the plaintiff was negligent in including in the repellent formulation ingredients that were pesticides and which required registration under the applicable law. The said ingredients were known as methylisothiazolinone ('MIT') and rosemary oil. The defendant argued that, this negligent act resulted in losses being sustained by the defendant. Under the contractual terms of the sale and purchase of the goods, any complaint from the defendant as the purchaser must be lodged within seven days of receipt of delivery of the goods. The issues relating to the counterclaim were: (a) whether the plaintiff, as a contract manufacturer, owed the defendant a duty of care; (b) whether there had been a breach of that duty of care in the mislabeling of the 100ml tubes and the inclusion of rosemary oil into the Denguard lotion; and (c) whether the damages in the defendant's counterclaim were foreseeable in the circumstances of the present case.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) The basic facts giving rise to the plaintiff's claim which was that the goods that the plaintiff had agreed to manufacture for the defendant had been delivered to the defendant and that the price of the goods had not yet been paid by the defendant were not in dispute. As a consequence, the court entered judgment for the plaintiff in accordance with para 10 of its statement of claim (see para 12(a)).

(2) The losses that were said to have been sustained by the defendant were reasonably foreseeable and there existed a relationship of proximity between the parties. However, it would not be just, fair or reasonable for the court to impose a duty of care on the plaintiff, because the parties had agreed by contract for the plaintiff's liability to be limited to circumstances where a claim was made within seven days of delivery of products (see paras 12(b), 20 & 43).

(3) The defendant's claim for the costs incurred in reprinting the labels for the 100ml tubes amounted to a departure from the defendant's pleaded case. The defendant knew and ought to have known as a matter of fact that MIT had not been included in the 100ml tubes. In any event, on the facts of the present case, there was no breach of the duty of care (if any) owed to the defendant because a representative of the defendant had directed for the plaintiff to proceed with the production of the cylinders for the 100ml tubes (see paras 12(c) & 52–54).

(4) In relation to the inclusion of rosemary oil into the Denguard lotion, the plaintiff had sufficiently discharged any duty of care it may have owed the defendant when it informed the defendant on 17 May 2013 that rosemary oil required registration with the authorities (see paras 12(d) & 57–58).

[Bahasa Malaysia summary

Defendan telah melantik plaintif untuk membuat penghalau nyamuk yang dikenali sebagai losyen Denguard. Plaintif telah membuat barangan itu dan menghantarnya kepada defendan, tetapi defendan telah gagal untuk membayar harga barangan itu kepada plaintif. Berikutan itu, plaintif telah menyaman defendan untuk barangan yang telah dijual dan dihantar itu. Defendan menuntut balas bahawa plaintif telah cuai kerana memasukkan bahan racun perosak yang memerlukan pendaftaran di bawah undang-undang yang terpakai ke dalam bahan rumusan penghalau itu. Rumusan tersebut dikenali sebagai methylisothiazolinone ('MIT') and minyak rosemary. Defendan berhujah bahawa, tindakan cuai ini mengakibatkan kerugian yang dialami oleh defendan. Di bawah terma kontraktual jual beli barangan itu, apa-apa aduan daripada defendan sebagai pembeli hendaklah dibuat dalam tempoh tujuh hari dari penerimaan penghantara barangan itu. Isu-isu

berkaitan tuntutan balas adalah: (a) sama ada plaintif, sebagai pembuat kontrak, mempunyai kewajipan berjaga-jaga terhadap defendan; (b) sama ada terdapat pelanggaran kewajipan berjaga-jaga itu kerana salah melabelkan tiub-tiub 100ml dan dimasukkan minyak rosemary ke dalam losyen Denguard itu; dan (c) sama ada ganti rugi dalam tuntutan balas defendan boleh dijangkakan dalam keadaan kes ini.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Fakta asas yang menimbulkan tuntutan plaintif iaitu bahawa barangan yang plaintif telah bersetuju buat untuk defendan yang telahpun dihantar kepada defendan dan bahawa harga barangan itu masih belum dibayar oleh defendan adalah tidak dipertikaikan. Akibatnya, mahkamah memasuki penghakiman bagi pihak plaintif menurut perenggan 10 penyataan tuntutannya (lihat perenggan 12(a)).

(2) Kerugian yang dikatakan telah dialami oleh defendan boleh dijangkakan dengan munasabah dan wujud hubungan rapat antara pihak-pihak. Walau bagaimanapun, ia tidak adil, saksama atau munasabah untuk mahkamah mengenakan kewajipan berjaga-jaga terhadap plaintif, kerana pihak-pihak telah bersetuju melalui kontrak agar liabiliti plaintif terhadap kepada keadaan di mana suatu tuntutan telah dibuat dalam tempoh tujuh hari penghantaran produk (lihat perenggan 12(b), 20 & 43).

(3) Tuntutan defendan untuk kos yang terakru dalam mencetak semula label-label untuk tiub-tiub 100ml itu merupakan suatu yang menyimpang daripada kes yagn dipli oleh defendan. Defendan mengetahui dan sepatutnya mengetahui sebagai hakikatnya bahawa MIT tidak dimasukkan dalam tiub-tiub 100ml itu. Dalam apa keadaan, berdasarkan fakta kes ini, tiada pelanggaran kewajipan berjaga-jaga (jika ada) terhadap defendan kerana wakil defendan telah mengarahkan untuk plaintif meneruskan dengan pengeluaran silinder untuk tiub-tiub 100ml itu (lihat perenggan 12(c) & 52–54).

(4) Berhubung kemasukan minyak rosemary ke dalam losyen Denguard itu, plaintif telahpun dengan sewajarnya melaksanakan kewajipan berjaga-jaga yang mungkin terdapat olehnya terhadap defendan apabila ia memberitahu defendan pada 17 Mei 2013 bahawa minyak rosemary itu memerlukan pendaftaran dengan pihak berkuasa (lihat perenggan 12(d) & 57–58).]

Notes

For a case on manufacture of goods, see 12(1) *Mallal's Digest* (5th Ed, 2015) para 1656.

For cases on claim for payment, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5284–5288.

Cases referred to

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Henderson v Merrett Syndicates Ltd [1994] 3 All ER 506, HL (refd)
Holt v Payne Skillington [1996] PNLR 179, CA (refd)
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520, HL (refd)
Lipkin Gorman (a firm) v Karpnale Ltd and another [1992] 4 All ER 409, CA (refd)
Nunes (J) Diamond Ltd v Dominion Electric Protection Ltd (1972) 26 DLR (3d) 699, SC (refd)
Pacific Associates Inc v Baxter [1990] 1 QB 993, CA (refd)
Riyad Bank v Ahli United Bank (UK) plc [2006] EWCA Civ 780, CA (refd)
Ross v Caunters [1980] Ch 297, Ch D (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, PC (refd)

Legislation referred to

Pesticides Act 1974 First Schedule

Colin Victor George (James Edwin & Co) for the plaintiff.
Dhanaraj Vasudevan (B Devandra with him) (Kamil Hashim Raj & Lim) for the defendant.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff in this case, Bodybasixs Manufacturing Sdn Bhd, is a contract manufacturer of personal and skin care products. It had been engaged by the defendant, Entogenex Industries Sdn Bhd, to manufacture mosquito repellent to its specifications.

[2] The plaintiff's claim was a straight forward claim for goods sold and delivered. It was not in dispute that the goods that the plaintiff had agreed to manufacture for the defendant had been delivered to the defendant and that the price of the goods had not yet been paid by the defendant. As the basic facts giving rise to the claim were not in dispute, I entered judgment for the plaintiff in accordance with para 10 of its statement of claim.

[3] While the defendant did not deny having received the goods in question, it claimed that the plaintiff was negligent in including in the repellent formulation ingredients that were pesticides and which required registration

under the applicable law. This negligent act, it was contended, resulted in losses being sustained by the defendant. The defendant's counterclaim exceeded the amount of the plaintiff's claim.

Material background facts

[4] The material background facts of this case were as follows.

[5] The defendant was contracted to supply mosquito repellent in connection with a program sponsored by the Malaysian Ministry of Science, Technology and Innovation. This program involved the distribution of 100,000 dengue control kits. The defendant possessed the know-how relating to the use of an extract from the wild tomato plant as a non-toxic insect repellent, and had engaged the plaintiff to manufacture a mosquito repellent lotion that was to be included in such kits.

[6] The parties commenced discussions in 2012. They entered into two agreements: a mutual non-disclosure agreement on 6 June 2012 and materials transfer agreement on 11 June 2012. These agreements were intended to (among others) preserve the confidentiality of proprietary information and materials that to be transferred between the parties. These agreements do not, however, govern any of the matters in dispute between the parties.

[7] The goods had been provided pursuant to two quotations dated 25 February 2015 and 27 November 2015. Under the contractual terms of the sale and purchase of the goods, any complaint from the defendant as the purchaser must be lodged within seven days of receipt of delivery of the goods. Although no such complaint was made by the defendant, the defendant nonetheless contended that it was entitled to raise the counterclaim, for the fact that the counterclaim was not premised on the contract of purchase, but rather premised in tort.

[8] After having been supplied with the mosquito repellent that had been manufactured by the plaintiff, the defendant was summoned by the Pesticides Board regarding the inclusion of methylisothiazolinone (referred to here as 'MIT') and rosemary oil in the repellent lotion (which was known as Denguard Dengue Defence Lotion). These two compounds are listed in the First Schedule to the Pesticides Act 1974 and required registration for inclusion into any consumer product. No such registration had been obtained. Furthermore, the inclusion of these compounds would have been contrary to the defendant's own claim that the Denguard lotion contained only natural and non-toxic substances.

[9] As events turned out, MIT had not been included in the ingredients of the Denguard lotion after all. The containers had been mislabelled. The defendant incurred additional production costs for the reprinting of additional labels for the products that were packaged in 100ml tubes. It was advanced in submissions by counsel for the defendant that the mislabelling of the tubes was the result of the plaintiff's negligence.

[10] On the issue of the inclusion of rosemary oil into the Denguard lotion, the defendant contended that this too was the result of the plaintiff's negligence.

ISSUES

[11] Having heard the evidence at trial and the submissions of counsel, I was of the view that the key and determinative issues relating to the counterclaim in this case could be summarised into the following:

(a) whether the plaintiff, as a contract manufacturer, owed the defendant a duty of care, in circumstances where:

  (i) there existed a contract between them; and

  (ii) the terms of this contract would have precluded liability of the plaintiff from arising;

(b) whether there had been a breach of that duty of care in the mislabelling of the 100ml tubes and the inclusion of rosemary oil into the Denguard lotion; and

(c) whether the damages in the defendant's counterclaim were foreseeable in the circumstances of this case.

SUMMARY OF FINDINGS AND DECISION

[12] The following summarises the findings of this court:

The plaintiff's claim

(a) The basic facts giving rise to the plaintiff's claim — which was that the goods that the plaintiff had agreed to manufacture for the defendant had been delivered to the defendant and that the price of the goods had not yet been paid by the defendant — were not in dispute. As a consequence, judgment was entered for the plaintiff in accordance with para 10 of its statement of claim.

No duty of care on the plaintiff

(b) In relation to the defendant's counterclaim and the contention that the plaintiff owed a duty of care to the defendant:

(i) the losses that were said to have been sustained by the defendant were reasonably foreseeable;

(ii) there existed a relationship of proximity between the parties; and

(iii) however, it would not be just, fair or reasonable for the court to impose a duty of care on the plaintiff, for the reason that the parties have agreed by contract for the plaintiff's liability to be limited to circumstances where a claim is made within seven days of delivery of the products.

The misprinting of the 100ml tubes

(c) In relation to the defendant's claim for the costs incurred in reprinting the labels for the 100ml tubes:

(i) this claim was dismissed because it amounted to a departure from the defendant's pleaded case; and

(ii) in any event, on the facts of this case, there was no breach of the duty of care (if any) owed to the defendant because a representative of the defendant had directed for the plaintiff to proceed with the production of the cylinders for the 100ml tubes.

The inclusion of rosemary oil

(d) In relation to the inclusion of rosemary oil into the Denguard lotion, I found that the plaintiff had sufficiently discharged any duty of care it may have owed the defendant when it informed the defendant on 17 May 2013 that rosemary oil required registration with the authorities.

[13] These findings are explained in greater detail in the following paragraphs.

THE EXISTENCE OF A DUTY OF CARE

[14] Three ingredients must be fulfilled in order to establish the existence of a duty of care between the parties:

(a) the damage must have been reasonably foreseeable;

(b) there must have been a relationship of proximity between the parties; and

(c) it must be just, fair and reasonable to impose a duty of care on the plaintiff here (as the defendant in the counterclaim). A

[15] The above is a distillation of the dicta of Lord Bridge in the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, where it was held: B

> [I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. C

[16] I make the observation that the question of foreseeability of damage is considered twice in negligence cases: first when considering the existence of a duty of care, and again when considering the remoteness of damage. D

[17] The particulars of the present case were that there existed contractual obligations between the parties governing their commercial relationship. The defendant owned or appeared to own the intellectual property rights to a substance known as EGX-101, a natural compound extracted from the wild tomato plant which is said to repel mosquitoes. In order to protect its intellectual property rights, the defendant entered into two agreements, a mutual non-disclosure agreement to preserve the confidentiality of information supplied to the plaintiff, and a material transfer agreement, which governed the terms upon which EGX-101 was provided to the plaintiff. E F

[18] No specifically negotiated agreement was however entered into between the parties to govern the terms upon which the Denguard lotion was to have been manufactured and supplied. The agreement between them was governed by a series of documents comprising quotations, purchase orders, tax invoices and delivery orders. A term in the tax invoices issued by the plaintiff prohibited claims being made unless such claim was made within seven days of receipt of the goods. It is common ground that the defendant would have been barred by this term had its counterclaim been grounded in contract. G H

[19] The key question is thus whether the court in the circumstance of this case ought to impose a concurrent tortious duty of care on the plaintiff when there existed a contract between the parties, the terms of which expressly excluded the defendant from mounting the counterclaim. I

[20] Before embarking on an examination of the applicable case law, I would make the following observations and findings:

(a) the losses that were said to have been sustained by the defendant were, in my judgment, reasonably foreseeable. The inclusion of regulated substances in a formula that was to have been natural and pesticide-free clearly may have caused the products to be rejected by the end-user and delays to the delivery schedule;

(b) I am also of the view that there existed a relationship of proximity between the parties. From 2012, the parties had been working in close collaboration to produce a formulation that had comparable effectiveness to formulations produced by another contract manufacturer previously engaged by the defendant. There had been numerous tests conducted on various formulations, the results of which were shared with the plaintiff by the defendant. The formulation was then adjusted to take into account the test results. Among the important criteria for the formulation were matters such as the repellency or protection offered over a period of time after application of the lotion. The facts, in my view, indisputably show a significant degree of proximity to found the basis of a duty of care; and

(c) the remaining question was thus whether it would be just, fair and reasonable for the court to impose a duty of care in this case. The examination of the inter-relationship between the contractual duties and the putative tortious duties will be carried out to address this question.

The case law on concurrent duties

[21] It is well established in case law that the existence of a contractual relationship between parties does not preclude the imposition of a duty of care between them. Nor does the law prevent a claimant from recovering compensation for pure economic loss.

[22] Thus, a client of a solicitor may sue for advice negligently provided, even though the solicitor-client relationship may be grounded in contract. In this example, there is not only concurrent liability in tort and contract, but also obligations that arise by reason of the solicitor's position as a fiduciary.

[23] What follows is a discussion of the cases where the courts have considered the incidence of concurrent liability in tort and in contract. The examination of these cases are instructive in order to elicit the applicable general principles. Needless to say, whether a duty of care can be said to exist in any particular case must depend on the specific circumstances of that case.

[24] In considering the question of concurrent liability in tort and in contract, it would be useful to distinguish between three broad categories of

cases where tortious liability have been held to exist alongside contractual structures and arrangements entered into between the affected parties:

(a) the first is where there is no contractual privity between the particular plaintiff and the defendant, but where they may nonetheless owe contractual duties to other persons in connection with the subject matter of the dispute. For example, a plaintiff developer may have a contract, say, with a main contractor, and the main contractor may have then engaged a subcontractor to perform certain portions of the main contractor's obligations to the developer. The issue is whether there can exist a duty of care on the part of the subcontractor owed directly to the plaintiff developer;

(b) the second category is where there *is* contractual privity between the plaintiff and defendant, but where the plaintiff contends that there exists a concurrent tortious duty of care; and

(c) the final category is where there is contractual privity, but where the defendant is also in an accepted class of persons who owe fiduciary duties to the plaintiff.

[25] It is important to bear in mind these differences when considering the decided cases, as the readiness of the courts to hold that there exists concurrent duties in tort and in contract may differ depending on which category the case falls under.

[26] An example of the first category of cases would be *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, where the House of Lords imposed liability in tort on a specialist flooring subcontractor to a plaintiff employer for the negligent construction of a factory floor. The defendant concluded a contract with the main contractor, who were responsible for the construction of the plaintiff's factory. However, no privity existed between the plaintiff and the defendant. The plaintiff nonetheless contended that its architects had relied upon the defendant as a flooring specialist to ensure that the floor was correctly laid. The House of Lords (Lord Brandon dissenting) held, even though there was no contractual privity between the plaintiff and the defendant, the defendant was nonetheless liable in negligence. The special skill and experience of the defendant and the fact that they were subcontractors nominated by the plaintiff's agents were significant factors in finding the existence of a duty of care. Lord Roskill held:

> Turning back to the present appeal I therefore ask first whether there was the requisite degree of proximity so as to give rise to the relevant duty of care relied on by the respondents. I regard the following facts as of crucial importance in requiring an affirmative answer to that question. (1) The appellants were nominated sub-contractors. (2) The appellants were specialists in flooring. (3) The appellants knew what products were required by the respondents and their main contractors

and specialised in the production of those products. (4) The appellants alone were responsible for the composition and construction of the flooring. (5) The respondents relied upon the appellants' skill and experience. (6) The appellants as nominated subcontractors was as close as it could be short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently (as it must assumed that they did) the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss.

[27] In *Ross v Caunters* [1980] Ch 297, the solicitors preparing a will for execution by a testator failed to warn him that the will should not be witnessed by the spouse of a beneficiary. One of the witnesses was in fact the husband of one of the beneficiaries, causing the gift to that beneficiary to be void. The beneficiary sued the solicitors. The solicitors admitted negligence but contended that they owed a duty of care not to the beneficiary, but to the testator alone. Sir Robert Megarry VC nonetheless found the solicitors liable, finding that there were three stand-out features in this case that called for mention:

First, there is the close degree of proximity of the plaintiff to the defendants. There is no question of whether the defendants could fairly have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part, or whether they ought to have done so: there is no 'ought' about the case. This is not a case where the only nexus between the plaintiff and the defendants is that the plaintiff was the ultimate recipient of a dangerous chattel or negligent mis-statement which the defendants had put into circulation. The plaintiff was named and identified in the will that the defendants drafted for the testator. Their contemplation of the plaintiff was actual, nominate and direct. It was contemplation by contract, though of course the contract was with a third party, the testator.

Second, this proximity of the plaintiff to the defendants was a product of the duty of care owed by the defendants to the testator: it was in no way casual or accidental or unforeseen. The defendants accepted a duty towards the testator to take reasonable care that the will would, inter alia, carry a share of residue from the testator's estate to the plaintiff. In all that they did (or failed to do) in relation to the will, the solicitors were bound by the duty of care towards the testator that they had accepted; and that duty included a duty to confer a benefit on the plaintiff. When a solicitor undertakes to a client to carry through a transaction which will confer a benefit on a third party, it seems to me that the duty to act with due care which binds the solicitor to his client is one which may readily be extended to the third party who is intended to benefit.

Third, to hold that the defendants were under a duty of care towards the plaintiff would raise no spectre of imposing on the defendants an uncertain and unlimited liability. The liability would be to one person alone, the plaintiff. The amount would be limited to the value of the share of residue intended for the plaintiff. There would be no question of widespread or repeated liability, as might arise from some

published mis-statement upon which large numbers might rely, to their detriment. There would be no possibility of the defendants being exposed, in the well-known expression of Cardozo CJ, 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class': *Ultramares Corporation v Touche* (1931) 174 NE 441, 444. Instead, there would be a finite obligation to a finite number of persons, in this case one.

[28] In *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, the House of Lords held that Lloyd's names were owed a duty of care by Lloyd's managing agents, even though the names' direct contracts were with the member's agents, who had in turn retained the managing agents. The managing agents had held themselves out as possessing special expertise to advise on the risks to be underwritten and the reinsurance arrangements, and in so doing had voluntarily assumed responsibility to the names. Lord Goff, in delivering the leading speech, stated:

[L]iability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.

[29] The passage above suggests that there may be concurrent duties in tort and in contract unless the terms of the contract expressly excludes liability. Based on the facts of that case, there had in fact not been any direct contractual relations between the Lloyd's names and the Lloyd's managing agents. To that extent, that passage did not form the *ratio decidendi* of the case.

[30] In the more recent case of *Riyad Bank v Ahli United Bank (UK) plc* [2006] EWCA Civ 780, a Syariah-compliant fund established by a Saudi bank was to receive investment advice from a Kuwaiti bank. In order to avoid the adverse marketing impact of a Saudi fund being advised directly by a Kuwaiti bank, the arrangement was for the Kuwaiti bank to provide advice to the Saudi bank by a contract between them, and thereafter for the Saudi bank to provide that same advice through a contract to its own separately incorporated fund. The Court of Appeal held that the Kuwaiti bank owed a direct tortious duty to the Saudi fund, noting that there had been substantial communications between them. Per Longmore LJ:

[Counsel for the defendant] then relied on building cases such as *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791; [1988] QB 758 and; [2006] 2 All ER (Comm) 777 at 790 *Pacific Associates Inc v Baxter* [1989] 2 All ER 159; [1990] 1 QB 993 for the proposition that where there is a contractual chain, that chain should not be by-passed by a claim in tort. As Lord Goff said in *Henderson v Merrett* that is, indeed, the usual position. But neither of those

A authorities considered a case where discussions and representations were made directly to the party who, in the event, suffered loss. There cannot be a general proposition that, just because a chain exists, no responsibility for advice is ever assumed to a non-contractual party. It all depends on the facts.

B **[31]** In this particular case, the fact that there had been discussions and representations made directly by the defendant to the plaintiff operated to establish a duty of care owed by the former to the latter, despite the contractual structures adopted to govern the inter-relationship of the parties.

C **[32]** In *Pacific Associates Inc v Baxter* [1990] 1 QB 993, the claimants were contractors engaged for dredging works by an employer. The works were under the supervision of an engineer retained by the employer. The contract between employer and the claimant contained a clause providing that the engineer would not be personally liable for acts done under the contract and that disputes between the employer and the contractor was to be resolved by arbitration. The claimant contended that the geological information given in the tender document issued by the engineer had under estimated the amount of hard material to be dredged. The claimants succeeded in obtaining an award for some of its contended losses at arbitration, and sought to recover the remainder through a negligence action against the engineer. The Court of Appeal held that it would not reasonable to impose a duty of care because it would 'cut across and be inconsistent with the structure of relationships entered by the contracts'.

D

E

F **[33]** The cases discussed thus far were concerned with the situation where a non-party to a contract was sought to be made liable in negligence. In the following paragraphs, I discuss the cases where the courts considered the existence and scope of tortious duties existing side-by-side with contractual obligations.

G

[34] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 was a decision of the Judicial Committee of the Privy Council on appeal from Hong Kong. In this case, a dishonest employee of Tai Hong Cotton Mill Ltd defrauded some HK$5.5m by forging his employer's signatures and by opening bank accounts in names that were similar to those of real suppliers to the company. The bank sought to argue that the company owed a duty to the bank in question to take reasonable precautions to prevent forged cheques from being presented for payment and to check the monthly statements in order to notify the bank of discrepancies in the statements. The Privy Council rejected the notion that such a duty of care could exist, holding that had the bank wished for such duty to exist, it would have to be written into the contract with its customer.

H

I

[35] The dicta of Lord Scarman in *Tai Hing* was considered by Lord Goff in *Hendersen v Merrett* discussed at para 29 ante, who held that *Tai Hing* did not stand for the wider proposition that there could never be a tortious duty between contracting parties.

[36] Cases decided after *Tai Hing* appear to have settled on the position that there may indeed exist concurrent duties in contract and tort. In *Holt v Payne Skillington* [1996] PNLR 179, the Court of Appeal of England and Wales found no reason why those concurrent duties must also be co-extensive with one another. In this case, the plaintiffs were brothers and chartered surveyors who were looking to acquire property in London to minimise their capital gains tax liability arising from the sale of their family-owned estate agent business in Coventry. They were looking for a suitable property in London to obtain tax relief. It would have been possible to do so if the property purchased was a building to be used for the purposes of a trade. However, residential property in London did not qualify for such relief unless there had been compliance with certain special planning provisions. To this end, the plaintiffs engaged Payne Skillington, a firm of solicitors to act for them in the contemplated purchase of 10 Berkeley Street in Mayfair. The firm of De Groot Collis, estate agents and surveyors, were also engaged by the Holt brothers. The solicitors (the first defendant) were instructed to investigate whether the building could be used as holiday accommodation under the relevant planning laws (which would have granted the tax relief sought).

[37] The solicitors however failed to do so. At first instance, the judge found the firm of solicitors liable for professional negligence. The trial judge also found the second defendants, De Groot Collis, liable in negligence, even though he found that the firm was not liable according the terms of the contract under which the firm had been engaged, as there was no express or implied term that the second defendant would be engaged on planning matters. On appeal to the Court of Appeal, the second defendant's appeal was allowed on the basis that none of the instances of advice given by the representative of the second defendant was capable of amounting to advice on which either plaintiff acted to his detriment. The relevant passages from the judgment of Hirst LJ bear setting out in full:

> It is true that, as Lord Goff observed in *Henderson v Merrett* (supra: see p 186F), the issue in the *Tai Hing* case was whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract between banker and client. However, the relevant assumption of responsibility which was considered in the *Tai Hing* case was entirely within the context of the contract between the parties. As Lord Goff made clear in the passage from his speech in *Henderson v Merrett* to which Mr Lewison referred, it will frequently be the case that the relevant assumption of responsibility does occur within a contractual context. That fact does not mean that it must necessarily do so simply because, at some stage during the relevant course of dealing between the

parties, they choose to and do enter into some form of contract. A consideration of the individual facts and circumstances of each case will determine whether any duty of care in tort which the general law may impose is of wider scope than any contract to which the same parties may agree at some stage during the same course of dealing. It is important to emphasise that the duty of care in tort is, in appropriate circumstances, imposed by the general law, whereas the contractual obligations result from the common intention of the parties. In our opinion, there is no reason in principle why a *Hedley Byrne* type duty of care cannot arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort. In such circumstances, the duty of care in tort and the duties imposed by the contract will be concurrent but not coextensive. The difference in scope between the two will reflect the more limited factual basis which gave rise to the contract and the absence of any term in that contract which precludes or restricts the wider duty of care in tort.

[38] The closing sentence of this passage is important, because it shows that while the law does not preclude the existence of concurrent contractual and tortious duties, the incidence and scope of the concurrent duties are dependent on the facts and circumstances of each case. In particular, the parties may have agreed or evinced an intention to preclude the existence of a tortious duty, or to limit its scope.

[39] In as far as the firm of solicitors were concerned, this case also illustrates the principle that the courts would be more than ready to find that a tortious duty of care exists where the defendant is in a category of persons who are recognised as fiduciaries. In such a case, a claimant would be able to base its cause of action on negligence, breach of fiduciary duty or on contract, depending on the circumstances of the case.

[40] In *Nunes (J) Diamond Ltd v Dominion Electric Protection Ltd* (1972) 26 DLR (3d) 699 the defendants had let out a burglar alarm system to the claimant. The contractual terms of the hire expressly provided that no warranties were given regarding the operation of the system. However, despite this, the defendant had stated to the claimant that the burglar alarm supplied was fool-proof. The Canadian Supreme Court refused the claim for negligence on grounds that to do so would vary the contract from one of hire to one of insurance.

[41] I have taken some time to address the applicable case law as there are but a handful of cases from the Commonwealth (and none from Malaysia, as far as I am able ascertain) dealing with the question of concurrent duties other than cases involving suits against solicitors. From the above, the following principles of general application can be distilled:

(a) in circumstances where there is no privity between the claimant and the defendant:

(i) the courts will examine the surrounding contractual structures involving the other parties in the commercial relationship to ascertain whether it would be reasonable in the circumstances to impose a duty of care. In *Riyad Bank*, a duty of care was held to exist, whereas in *Pacific Associates Inc v Baxter* the claim was rejected; and

(ii) however, it is only in exceptional cases would the court hold that there would exist a concurrent duty of care, as it would have the effect of short-circuiting the contractual structures put in place by the parties (per Lord Goff in *Henderson v Merrett*);

(b) when there exists privity between the claimant and the defendant:

(i) despite the decision of the Privy Council in *Tai Hing*, there can exist a concurrent tortious duty owed to the claimant;

(ii) such concurrent duties need not be co-extensive with one another; and

(iii) the terms of the contract may preclude the existence of a wider duty in tort; and

(c) there may also be cases where there are concurrent contractual, tortious and fiduciary duties imposed on a party. The courts would more readily impose a tortious duty of care on a fiduciary. The duty of care in tort would however be co-extensive with the duty imposed in equity: see the dicta of Parker LJ in *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 409. Although the decision of the Court of Appeal in this case was reversed by the House of Lords on other grounds, the decision of the Court of Appeal remains good law on this point.

The application of the law to the facts

[42] On the facts of this case, the agreement between the plaintiff and the defendant relating to the supply of the Denguard lotion was governed by a series of documents comprising quotations, purchase orders, tax invoices and delivery orders. As explained earlier, a term in the tax invoices issued by the plaintiff prohibited claims being made unless such claim was made within seven days of receipt of the goods. It was common ground that the defendant would have been barred by this term had it based its counterclaim on contract.

[43] In my judgment, taking into account the facts and circumstances of this case, it would not be just, fair or reasonable for the court to impose a duty of care on the plaintiff, for the reason that the parties have agreed by contract for

the plaintiff's liability to be limited to circumstances where a claim is made within seven days of delivery of the products.

[44] The defendant had been prepared to rely upon the standard contractual documentation to govern the supply of the products. It clearly had the opportunity to specifically negotiate the terms upon which the Denguard lotion was to have been manufactured and supplied, as it had required the plaintiff to sign non-disclosure and non-exploitation terms regarding the materials and information provided by the defendant to the plaintiff. However, the defendant chose not to negotiate a supply agreement.

[45] The contractual terms that did govern the supply of the products made it clear that the defendant would have only been entitled to make a claim within seven days of having received delivery of the product. In my considered view, to hold that the defendant was owed a duty of care would be inconsistent with this contractual term that limited the ability of the defendant to make a claim relating to the products that had been supplied. What was being contended by counsel for the defendant was that there existed a concurrent tortious duty of care alongside the contractual rights and obligations of the parties. I am unable to accept this submission, as the parties had clearly evinced an intention to preclude the possibility of such a tortious duty arising. The case of *Nunes (J) Diamond Ltd v Dominion Electric Protection Ltd* is directly on point here, as is the dicta of Lord Goff in *Henderson v Merrett* (see paras 28–29, ante).

The issue of the manufacturing standards

[46] Counsel for the defendant submitted at length on the fact that the plaintiff is a Good Manufacturing Practice-approved manufacturer as well as an ISO 9001-certified manufacturer. Good Manufacturing Practice or 'GMP' defines the fundamental operational practice standards that are required in order to comply with the guidelines set by the Malaysian Ministry of Health for food and pharmaceutical product manufacturers.

[47] These practice standards require (among others) a manufacturer to ascertain the applicable statutory and regulatory requirements in the supply of goods and services to its customers. The testimonies of the witnesses for the defendant was that the plaintiff was selected by the defendant because it was a GMP-certified manufacturer. Counsel for the defendant maintained that a letter issued by the plaintiff dated 1 October 2015 established that the plaintiff had not discharged its duty to ensure that the Denguard lotion complied with the applicable regulatory requirements.

[48] In my judgment, this contention failed because:

(a) firstly, even if the plaintiff had been chosen as a contract manufacturer because of its special qualifications, it would not be just, fair or reasonable for a duty of care to be imposed upon the plaintiff in circumstances where the express contractual terms limited the plaintiff's liability to the defendant.

Junior Books Ltd v Veitchi Co Ltd (the facts of which are discussed at para 26, ante) recognised that reliance by a claimant on the special skill of a defendant was a factor to be taken into account in determining whether there existed a relationship of sufficient proximity between the parties to give rise to a duty of care owed by the defendant. However, in that case there was no privity between the parties. In the circumstances of the present case, the parties had not only entered into contractual relations to govern their relationship but had also agreed on terms that expressly limited the plaintiff's liability. To impose a duty of care in these circumstances would not be just, fair or reasonable.

I leave open the possibility that a concurrent duty of care may, in the appropriate case, still be held to exist even in circumstances where the parties to a contract had expressly agreed to limit their liability inter se. Whether or not such a duty could be said to exist must be dependent on the facts and circumstances of each case. On the facts of this case before me, there was no factor that would have prompted me to find for the existence of such a duty of care despite and in the light of the express limitation of liability; and

(b) secondly, even assuming that such a duty of care existed, I am of the view that the 1 October 2015 letter did not constitute proof of any breach by plaintiff of its obligations. This point is addressed in greater detail at para 60, et seq, post.

[49] These findings would have been sufficient to have disposed of the counterclaim. In the following paragraphs, I address the point that, even if a duty of care could be said to have existed, there was no breach of that duty of care by the plaintiff.

NO BREACH

[50] The defendant's pleaded case in its counterclaim was that MIT and rosemary oil had been included in the formulation of the lotion and that this was the result of the plaintiff's negligence. In his submissions, counsel for the defendant contended that the plaintiff must be liable to the defendant for damages in connection with the misprinting of the labels for the 100ml tubes and the inclusion of rosemary oil into the formulation for the Denguard lotion. I address these in turn.

The misprinting of the 100ml tubes

[51] At trial, it became apparent that MIT had not been included in the formula at all, which was contrary to the defendant's pleaded case. What had happened was that the 100ml tubes containing the Denguard Defence Lotion had been misprinted with MIT as one of its ingredients.

[52] In my view, this was a departure from the defendant's pleaded case. The defendant knew or ought to have known as a matter of fact that MIT had not been included in the 100ml tubes. Accordingly, the defendant's claim for the additional costs it had incurred in re-printing the labels for the 100ml tubes failed on a point of pleading.

[53] Secondly, I am of the view that, in any event, there was no breach of the duty of care owed to the defendant (assuming that a duty of care existed) because the contemporaneous documentary evidence shows that Elizabeth Tan Sheak Ling (PW1, an employee of the plaintiff) had asked a representative of the defendant whether the Pesticides Board had approved the artwork for the 100ml tubes, see B/77 of the trial bundles. She received a terse reply from Ethan Ranaweera (DW1, an employee of the defendant), which I reproduce verbatim:

> In light of our urgent requirements, pls proceed with cylinder making asap. PB has exempted the products (see attached letter). Therefore the claims/labels for Denguard Dengue Defense Lotion are not regulated by PB. As a result we do not wish to delay this any further. Your questions will be addressed when we meet next.

[54] Having received this missive, the plaintiff then — entirely reasonably in my view — proceeded with the printing of the cylinders for the 100ml tubes. No fault can be placed at the door of the plaintiff for having dutifully followed the instructions of the defendant.

The inclusion of rosemary oil

[55] The defendant also claimed that the plaintiff had been negligent in including rosemary oil in the ingredients of the lotion. This applied to both the 100ml tubes as well as the 500ml bottles.

[56] On the facts it was not disputed that rosemary oil had been included in the formulation. The inclusion of rosemary oil required prior registration with the Pesticides Board. The defendant claimed that its mistaken inclusion had caused it delay in implementing the programme of distribution of the 100,000 dengue control kits.

[57] The contemporaneous documents show that the plaintiff had, as early

as 17 May 2013, informed the defendant that rosemary oil required registration with the authorities (see B/41).

[58] In my judgment, this would have been sufficient to have discharged any duty of care that the plaintiff may have owed the defendant. In my view, if the defendant's expectation was for the plaintiff to have undertaken all the regulatory clearance for the products manufactured, then there must have been in existence documents and correspondence showing this. Yet, they are conspicuous by their absence.

[59] I am of the view that no more could be expected of the plaintiff. Having told the defendant of the requirement for registration, it would have been entirely reasonable for the plaintiff to expect that the defendant will address all requirements for regulatory approvals. There were no documents or correspondence to show that the plaintiff had been tasked with the duty of obtaining regulatory clearance for the products. Indeed, there existed no invoices for any regulatory compliance services rendered.

[60] Much was made by the defendant of a letter issued by the plaintiff dated 1 October 2015 (see B/75). This was a letter addressed to whom it may concern, stating, among others, that the plaintiff was not aware that rosemary oil was required to be registered with the Pesticide Board.

[61] This letter is of course inconsistent with the plaintiff's earlier email dated 17 May 2013, where it was established that the plaintiff in fact knew that rosemary oil was a registrable ingredient and had told the defendant of this fact. The explanation put forth by the witnesses for the plaintiff was that this letter of 15 October 2015 was issued at the request of the defendant, and that the plaintiff had issued it in order to maintain goodwill with the defendant as its customer and to facilitate resolution of the regulatory compliance issues raised by the Pesticides Board.

[62] I accepted this explanation. I am of the view that it was the only reasonable explanation in the light of the existence of the earlier email of 17 May 2013. In addition, the cover email (see B/71) attaching the letter of 15 October 2015 (or a draft of such letter) stated that the letter had been written as per the request of Ethan Ranaweera (DW1).

[63] For the reasons explained above, I allowed the plaintiff's claim and dismissed the defendant's counterclaim.

Plaintiff's claim allowed; defendant's counterclaim dismissed.

Reported by Dzulqarnain Ab Fatar